SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-260

DAVID McGREGOR d/b/a McGREGOR WORLD TRAVEL SERVICE,

Petitioner,

—v.—

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents.

MEMORANDUM FOR RESPONDENTS

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Of Counsel

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ARGUMENT

Respondents concur that there is a conflict between the Courts of Appeals of the Second and Ninth Circuits on this important and recurring federal procedural question of whether or not a court order denying a stay of arbitration is appealable.[1] The holdings of the Second Circuit denying appealability, however, are manifestly correct. Having extensive experience with matters involving arbitration the Second Circuit has distinguished between stays of arbitration and stays of other court proceedings:

> "The reason for the different approach to stays of arbitration as compared to stays of other court proceedings

[1] Compare, *Greater Continental Corporation* v. *Schechter*, 422 F.2d 1100 (2d Cir. 1970) and *A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

is twofold: (1) appealability of a denial to stay arbitration would further delay the arbitration proceedings and thereby eliminate one of the primary purposes of arbitration, i.e., the speed of the proceedings; (2) arbitration differs from another court proceeding in the essential respect that arbitration would not produce an enforceable result without further judicial action" *Greater Continental Corporation* v. *Schechter*, 422 F.2d 1100, 1102-1103 (2d Cir. 1970).

In addition, contrary to petitioner's allegations, antitrust questions have no bearing on the rationale behind the decision of the Second Circuit in *Greater Continental, supra;* and antitrust issues are not before the arbitrators in this case.

The orders below do not require petitioner to "arbitrate antitrust issues."[2] As the District Court held in its order of April 16, 1971:

> "The questions for arbitration are whether the plaintiff did in fact breach its agreement with the defendants regarding the commissions, whether the disposition of the dispute with the other travel service was similar to this one and the propriety of the sanction itself."

Respondents thus disagree that the question to be arbitrated is whether respondents have violated the antitrust laws of the United States. Notwithstanding, since the issue of the appealability of an order denying a stay of arbitration is of importance in the uniform administration of federal appellate procedure and the orderly conduct of arbitration proceedings, a definitive ruling by this Court is appropriate.

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[2] Petition, p. 8.

For these reasons, respondents do not oppose the present petition.

Respectfully submitted,

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Dated: September 17, 1971

Certificate of Service

I, HAROLD L. WARNER, JR., hereby certify that:

1. I am a member of the Bar of this Court.

2. I have this day served the attached Memorandum for Respondents by depositing true copies thereof in a Letter Box maintained and exclusively controlled by the United States at 25 Broadway, New York, New York 10004, with first class postage prepaid, addressed to counsel for petitioner, Anthony F. LoFrisco, 10 East 40th Street, New York, New York 10016.

HAROLD L. WARNER, JR.

September 17, 1971